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No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AND THE REGULAR COMMON CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION OF THE NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND THE REGULAR COMMON CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 36.3 of this Court the National Motor Freight Traffic Association, Inc. and the Regular Common Carrier Conference jointly move for leave to file the attached brief as *amici curiae* in support of respondents.

The National Motor Freight Traffic Association, Inc. (NMFTA) is an association of some 3,000 motor common carriers subject to economic regulation by the Interstate Commerce Commission pursuant to 49 U.S.C. § 10101, *et seq.* NMFTA represents the interest of its member carriers in proceedings before Congress, the Courts and administrative agencies.[1] The most significant function performed by NMFTA is to serve as the agency through which its member carriers collectively discharge their duty under the Interstate Commerce Act to establish, maintain and publish in tariffs just and reasonable classifications of property, which they do under an agreement approved by the ICC under 49 U.S.C. § 10706(b).

The Regular Common Carrier Conference (RCCC) is an affiliated conference of the American Trucking Associations, Inc., the national trade association of the trucking industry. Its membership consists of some 500 motor common carriers of property which operate in interstate and foreign commerce throughout the contiguous United States and, for the most part, over regular routes. RCCC was originated and functions to foster, protect, and promote the interest of the regular-route motor common carrier industry. RCCC regularly appears in proceedings before the Interstate Commerce Commission and the courts which, like this one, involve issues of general importance to the transportation industry. Member carriers of RCCC participate in the collective process necessary to formulate the National Motor Freight Classification and are parties to that tariff as well as to the tariffs

[1]In *National Motor Freight Traffic Association* v. *U.S.*, 372 U.S. 246, 247 (1963) this Court, holding that NMFTA had standing to challenge ICC orders that affected its members, noted that it performed "significant functions in the administration of the Interstate Commerce Act. . . ."

collectively established by the ten major motor common carrier rate bureaus, including respondent Niagara Frontier Tariff Bureau, Inc.

As set forth in detail in the brief, *Amici* and their members have an immediate and direct interest in the outcome of this case. Briefly, if this Court overrules its decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), NMFTA and member carriers of NMFTA and RCCC will be placed in jeopardy of treble damage suits based on the fact that the ICC found classifications to have been collectively established unlawfully and ordered them cancelled.

Wherefore, the National Motor Freight Traffic Association, Inc. and the Regular Common Carrier Conferece move that the attached *amici curiae* brief be accepted for filing.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
CONSEQUENCES OF OVERRULING KEOGH	3
NO NEED TO OVERRULE KEOGH	5
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Filed Rate Doctrine Bars Recovery of Antitrust Damages	9
II. Shippers Have Adequate Remedies Under the Interstate Commerce Act	16
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 6, 9, 16, 21

Board of Trade v. United States, 314 U.S. 534 (1942) 21

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 7, 14, 15

Changes In Rates, Including Rates Based On Released Valuations, MAC, I & S Docket No. M-30367, aff'd. in *Middle Atlantic Conference v. U.S.*, No. 84-2195 (USCA 4th Cir.) (not reported) 18

Collective Ratemaking Procedures—Niagara Frontier Tariff Bureau, Inc., Case No. 71192, pending as *Niagara Frontier Tariff Bureau, Inc. v. U.S.*, *in* No. 84-1548 (USCA DC Cir.) 18

Collectively Set Accessorial Rates and Charges On Household Goods, HGCB, I & S Docket M-30371 18

Collectively Set Delivery Charges At Eastern Kentucky, C&SMFTA, I & S Docket No. M-30374 18

Compania De Gas, Etc. v. Entex, Inc., 686 F.2d 322 (5th Cir. 1982) 15

Compania De Gas, Etc. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C. Cir. 1979) 15

Ford Motor Co. v. Standard Transportation Co., et al., 308 I.C.C. 304 (1959) 14

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) 11

ICC v. American Trucking Associations, Inc. ___ U.S. ___, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984) ..... *passim*

Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation, 335 I.C.C. 403 (1969) 17

International Commodity Rates and Terminal Charges, NFTB, October 1985, I & S Docket No. M-30375 18

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922) ..... *passim*

Table of Authorities Continued

Page

Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94 10

Mohasco Industries, Inc. v. Acme Fast Fright, Inc., 491 F.2d 1082 (5th Cir. 1974), cert. denied, 419 U.S. 842 (1974) 8, 17

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) ..... *passim*

National Classification Committee v. U.S., 737 F.2d 1206 (D.C. Cir. 1984) 3

National Classification Committee v. U.S., 765 F.2d 164 (D.C. Cir. 1985) 4

Pickup and Delivery At Private Residences, C&SMFTA, October 1985, I & S Docket No. M-30376 18

Reclassification of Pork Skins and Bacon Rinds, NMFC, August 1982, No. M-30360 (1983) (not reported) 3, 4

T.I.M.E., Inc. v. U.S., 359 U.S. 464 (1959) ..... *passim*

Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 6, 10

Trailer Marine Transport Corp. v. Federal Maritime Commission, 602 F.2d 379 (D.C. Cir. 1979) 16

U.S. v. Associated Transport, 505 F.2d 366 (D.C. Cir. 1974) 17

STATUTES:

15 U.S.C. § 15 11

INTERSTATE COMMERCE ACT:

Former § 204a, Former 49 U.S.C. § 304a 16, 17, 20

49 U.S.C. § 10701 2

49 U.S.C. § 10702 2

49 U.S.C. § 10706(b) 2, 3, 19

49 U.S.C. § 11705(b) 20

49 U.S.C. § 11705(b)(3) 16

49 U.S.C. § 11705(c)(1) 16

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BRIEF OF NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND REGULAR COMMON CARRIER CONFERENCE, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* in support of respondents is filed by National Motor Freight Traffic Association, Inc. (NMFTA) and Regular Common Carrier Conference (RCCC).

NMFTA is an organization of approximately 3,000 motor common carriers of property. Under an agreement approved by the Interstate Commerce Commission (ICC) pursuant to Section 10706(b) of the Interstate Commerce Act, 49 U.S.C. 10706(b) [formerly Section 5a of the Act (49 U.S.C. § 5b)], NMFTA and its National Classification Committee are the agencies through which the NMFTA's members collectively discharge their duty under Sections 10701 and 10702 of the Act to establish, publish and maintain reasonable classifications of property governing transportation in interstate and foreign commerce, and reasonable rules related to that transportation. Those classifications and rules are filed with the ICC in a tariff known as the National Motor Freight Classification (NMFC).

Regular Common Carrier Conference is an organization of motor common carriers of general commodities. Its members perform true common carriage, i.e., they handle shipments of every type and serve all points and places for all shippers. Almost without exception, its members participate in the collectively established classifications in the NMFC and in the collectively established rates in the tariffs of one or more of the ten major rate bureaus operating under agreements approved by the ICC, including respondent Niagara Frontier Tariff Bureau.[1] More-

[1]The other nine are Central & Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Inc., Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, and Southern Motor Carriers Rate Conference.

over, most of their members are actively engaged in the collective classification and ratemaking process.

CONSEQUENCES OF OVERRULING *KEOGH*

If the Court overrules *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), the members of *Amici*, as well as NMFTA itself, will be exposed to catastrophic claims for antitrust damages arising from recent decisions of the ICC.

Reclassification of Pork Skins and Bacon Rinds, NMFC, August, 1982, No. M-30360 (1983) (not reported), was a formal investigation instituted by the ICC upon complaint by shippers that new classification items were unjust and unreasonable and had been established under collective ratemaking procedures that violated Section 14 of the Motor Carrier Act of 1980 (49 U.S.C. § 10706(b)). The ICC ordered the items cancelled on the ground that the collective action by which they were made was unlawful.[2] Its order was affirmed on judicial review without opinion. *National Classification Committee* v. *U.S.*, 737 F.2d 1206 (D.C. Cir. 1984).

On the basis of its decision in *Pork Skins,* the ICC issued an order requiring NMFTA to show cause why

[2]The ICC did not consider the claim that the new items were unjust and unreasonable. "The scope of the investigation is limited to rate bureau practices and the reasonableness of the underlying reclassification is not in question." *Decision on motions to compel answers to interrogatories,* served January 12, 1983 in Investigation and Suspension Docket M-30360. The same new items, subsequently established under different procedures, were again protested on the ground that they were unjust and unreasonable. The ICC declined to suspend or investigate them. *Notice* served July 12, 1985 in Suspension Case No. 71257.

some 500 changes in classification items made under the procedures condemned in *Pork Skins* had not been established by unlawful collective action. That proceeding resulted in an order requiring their cancellation, but prospectively only. That order was affirmed on judicial review. *National Classification Committee* v. *U.S.*, 765 F.2d 164 (D.C. Cir. 1985). However, the question of unlawful collective action *vel non* was a close one. As Judge Wald pointed out in her Separate Statement, "the Commission's interpretation of section 14 of the [Motor Carrier Act of 1980] in *Pork Skins* is not compelled by the plain language of the Act but requires an examination of Congress' purpose and intent in enacting section 14 as evidenced in the legislative history, which itself is neither extensive nor clearly definitive." 765 F.2d at 174.

In neither of these decisions did the ICC order the unlawfully established tariff items cancelled retroactively, which it could have done under its procedures approved by this Court in *ICC* v. *American Trucking Associations, Inc.*, ___ U.S. ___, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984). Obviously, it did not do so because it recognized that, in the circumstances of those cases, it would be grossly unfair to require carriers to refund to shippers overcharges measured by the difference between freight charges under the unlawfully established classification items and freight charges under the prior items. Nevertheless, if *Keogh* is overruled, the carriers will be exposed to antitrust damages on the basis of the ICC's decision that the tariff items had been established by unlawful collective action, notwithstanding that the ICC, exercising its discretion under its rejection procedures, determined that retroactive cancellation of the tariff items

was not warranted.[3] The scope of the exposure is tremendous. Some 500 classification items were collectively made under procedures found unlawful, and those items were applied by some 3000 carriers to calculate freight charges on thousands of shipments.

NO NEED TO OVERRULE *KEOGH*

Amici submit that the overruling of *Keogh* and the creation of a treble damage remedy under the antitrust laws is not necessary either to deter carriers from taking collective rate action in violation of those laws or to protect shippers against such action. Retroactive rejection of tariffs by the ICC, approved in *ATA*, does both. As the Government itself said in its brief in *ATA*, "[r]ejection is an immediate, narrowly focused, and effective remedy for rate bureau violations because it denies the carriers any benefit from collusive rates improperly arrived at." (Pet. Br. in No. 82-1643, p. 23). Again, in its reply brief the Government said: "The Commission's rejection rule is the logical means of implementing the principle that carriers are not entitled to collect rates that defy the antitrust laws because they reflect serious rate bureau violations." (Pet. Reply Br. in No. 82-1643, p. 9). This Court accepted the Government's proposition when it said:

> Indeed, the effect of the Commission's proposed new remedy is to convert the ICC into the federal government's most potent enforcer of the antitrust laws, albeit for the lim-

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[3]It is, of course, hornbook law that it is no defense to a suit in tort for damages that the action complained of was taken in good faith in the mistaken belief that it was lawful.

> ited purpose of ensuring compliance with the guidelines of § 14 of the MCA. 81 L.Ed.2d at 294.

Moreover, the rejection remedy carries out Congressional intent:

> [T]he [statutory] [p]rocedures governing the administration of § 14 [of the Motor Carrier Act of 1980] demonstrate that Congress envisioned that the Commission—and not the threat of antitrust liability—would be the primary enforcer of [Section 14]. Id. at 293.

SUMMARY OF ARGUMENT

This case is governed by the filed rate doctrine, as was *Keogh, supra.* If this Court overrules *Keogh,* it will be overruling a consistent line of filed rate cases stretching from the 1907 decision in *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, to the 1981 decision in *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, (1981) (ARKLA).

The core of the filed rate doctrine is that a regulated entity may charge only the rates filed with the regulatory authority and that the only legal right a purchaser has is the right to that rate. As *Keogh* held, "[u]nless and until suspended or set aside, this rate is made, *for all purposes,* the legal rate, as between carrier and shipper." 260 U.S. at 163. (Emphasis supplied).

Petitioners' claim of injury is based on their claim that the filed rates they paid were excessive, and that but for the allegedly unlawful collective action of the carriers, hypothetical lower rates would have been filed. They seek damages based on the difference between those hypothetical lower rates and the filed rates they paid. Thus, they are asking a court to do what this Court held a court cannot do, namely, "authorize commerce . . . on other [than filed rate] terms." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251 (1951).

In *T.I.M.E., Inc.* v. *U.S.,* 359 U.S. 464 (1959), this Court, applying *Montana-Dakota,* held that the statutory provision declaring unlawful and prohibiting unreasonable motor carrier rates "does not create a cause of action for the recovery of allegedly unreasonable past rates," and that no justiciable common law right survived the passage of the Motor Carrier Act.

Petitioners' reliance on *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966) is misplaced. That case was not a filed rate case because the rates, while required to be filed with the Federal Maritime Commission, were not subject to pervasive regulation. Hence, the filed rates did not fix the legal rights of shippers as against carriers "for all purposes", as do the rates of carriers regulated by the ICC. Moreover, the issue in *Carnation* was whether the Shipping Act "precludes the application of the antitrust laws to the shipping industry." 383 U.S. at 215. Respondents here make no such claim. Their narrow claim is that a shipper has no cause of action for damages based upon allegations that rates filed with the ICC were unlawfully established. *Carnation* shed no light on this issue.

In 1965 Congress, in response to the holding in *T.I.M.E.* that shippers had no remedy for the exaction of unlawful rates by motor carriers, created a cause of action for the recovery of reparations, which were

defined as "damages resulting from charges for transportation services to the extent that the ICC, upon complaint, finds them to have been [unlawful under the regulatory standards of the Interstate Commerce Act.]" This remedy is therefore necessarily the "exclusive remedy for excessive charges." *Mohasco Industries Inc.* v. *Acme Fast Freight*, Inc., 491 F.2d 1082, 1084 (5th Cir. 1974), cert. denied, 419 U.S. 842 (1974).

True enough, recovery in a suit for reparations for excessive rates requires a finding by the ICC that the filed rates were above the zone of reasonableness. However, this does not leave shippers without adequate remedies against carriers for establishing rates within the zone of reasonableness by unlawful collective action. First, the ICC has authority, acting *sua sponte* or upon complaint, to suspend and investigate filed rates not yet effective on the ground that they may have been established by unlawful collective action. The Commission freely exercises this authority. Second, in *ATA* this Court approved procedures of the ICC under which it may *sua sponte*, and will upon complaint, enter into an investigation whether filed and effective rates were established by unlawful collective action. If it finds a substantial violation of rate bureau procedures it will order the rates cancelled retroactively, thus requiring the carriers, in the words of this Court in *ATA*, to "disgorge" all of the amounts collected under the unlawfully established rates.

The retroactive rejection remedy is superior to an antitrust remedy because the latter would require a referral to the ICC of the question whether hypothetical rates that the carriers might have filed from time to time over a period of years would have been

just, reasonable and non-discriminatory. Such a referral would present serious problems. The first is that as *Keogh*, *Montana-Dakota* and *T.I.M.E.* held, there can be no referral of issues to an administrative agency that Congress has not given it independent jurisdiction to decide. Second, determinations of rate reasonableness require the consideration of numerous factors whose importance and relationship to each other are constantly changing. Hence, such determinations, if they are not to be largely speculative, must be made in the light of contemporaneous conditions. To ask the Commission to determine whether various hypothetical levels of rates that might have been established over many years would be to ask it to engage in pure speculation.

ARGUMENT

I. The Filed Rate Doctrine Bars Recovery of Antitrust Damages

This Court recently explained the filed rate doctrine in *ARKLA*, *supra*, 453 U.S. at 577-578, as follows:

> . . . the rates that a regulated gas company files with the Commission for sale and transportation of natural gas are lawful only if they are "just and reasonable." No court may substitute its own judgment on reasonableness for the judgment of the Commission. The authority to decide whether the rates are reasonable is vested by § 4 of the Act solely in the Commission . . . and "the right to a reasonable rate is the right to the rate which the Commission files or fixes." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251, 95 L.Ed. 912,

71 S.Ct. 692 (1951). . . . These straight-forward principles underlie the "filed rate doctrine," which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. See, e.g., *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 473, 3 L.Ed.2d 952, 79 S.Ct. 904 (1959). The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, see, e.g., *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516, 520-521, 83 L.Ed. 953, 59 S.Ct. 612 (1939); *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U.S. 184, 196-197, 57 L.Ed. 1446, 33 S.Ct. 893 (1913), and has been extended across the spectrum of regulated utilities.

The filed rate doctrine has been governing law since the 1907 decision in *Texas & P.R. Co.,* v. *Abilene Cotton Oil Co., supra.* This Court there held that the Interstate Commerce Act extinguished any common law right to a reasonable rail rate and substituted therefor a right to whatever rate was duly filed with the ICC, together with a right to reparations under the procedures of the Act in the event the ICC determined the rate to be unreasonable or discriminatory.

In its 1915 decision in *Louisville & Nashville R.R. Co.* v. *Maxwell,* 237 U.S. 94, this Court said:

> Deviation from [the file rate] * * * is not permitted upon any pretext. Shippers * * * are charged with notice of it, and they as well as the carrier must abide by it * * *. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress. . . . 237 U.S. at 97.

The *Keogh* and *Georgia*[4] decisions are two in the long line of filed rate cases stretching from *Abilene* through *ARKLA*. Applying the filed rate doctrine in *Keogh,* the Court held that a shipper's claim that, but for the carriers' conspiracy in violation of the antitrust laws, he would have paid a rate lower than the filed rate failed to state a cause of action because he was not "injured in his business or property." (15 U.S.C. § 15).

> [I]njury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, *for all purposes,* the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or *tort* of the carrier. 260 U.S. at 163. (Emphasis supplied).[5]

As this Court later put it in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.:* One "can claim no rate as a legal right that is other than the

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[4]Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945).

[5]A suit for damages under the antitrust laws of course sounds in tort.

filed rate, . . . and not even a court can authorize commerce in the commodity on other terms." Yet, that is precisely what petitioners here are asking the courts to do. They claim that the filed rates were excessive and that, but for the allegedly unlawful conduct of the carriers, hypothetical lower rates would have been filed. They seek damages based on the difference between those hypothetical lower rates and the filed rates they paid. Thus, they are asking the courts to "authorize commerce . . . on other [than the filed rate] terms."

Montana-Dakota was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern, at rates filed with the Federal Power Commission under the Federal Power Act. The gravamen of the complaint was that the rates violated the Act in that they were unreasonably high, that Northwestern had misled the FPC into accepting the rates by failing to comply with its obligations of disclosure under the Act, that the rates had therefore been improperly established, and that, through interlocking directorates, Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect.[6] This Court, applying the filed rate doctrine, held that the complaint failed to state a cause of action.

Dealing with the argument of the dissent that the issue of rate reasonableness could be referred to the FPC, the Court pointed out that referral of particular

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[6]Petitioners' somewhat analogous claim here is that "[t]he ICC regulatory plan contemplates shipper participation in an open rate-setting process" but that "[t]his opportunity is denied when the carriers formulate rates secretly." (Pet. Br. 12-13, n. 6).

issues to an administrative agency might be appropriate where the plaintiff "concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary." 341 U.S. at 253. However, under the filed rate doctrine a plaintiff has no cause of action for damages grounded on a claim that he has a right to a rate other than the filed rate. Hence, Montana's claim that, but for the fraud alleged, it would have paid a lower rate failed to state a cause of action.

As the Court said:

> Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. 341 U.S. at 253-254.

So too, as *Keogh* held, injury is an "essential element" of remediable action in an antitrust damage case. Accordingly, *Montana-Dakota* stands squarely for the proposition that petitioners were not injured by the alleged misconduct of respondents unless they paid rates that were unreasonable under the substantive rate regulatory standards of the Interstate Commerce Act.

In *T.I.M.E., Inc.* v. *United States, supra,* motor carriers sued the United States, *qua* shipper, to collect freight charges the United States had refused to pay on the ground that the rates upon which they were computed were unjust and unreasonable. This Court stated the single question before it as follows: "Can a shipper of goods by a certificated motor car-

rier challenge in post-shipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment?" Id. at 465.

Relying on *Montana-Dakota,* the Court answered no. It held that the statutory duty of carriers to establish and observe reasonable rates, charges and classifications "creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right' ". (Quoting *Montana-Dakota*). As for the statutory provision declaring unlawful and prohibiting unreasonable rates, it "does not create a cause of action for the recovery of allegedly unreasonable past rates." The Court then went on to hold that shippers have no "justiciable legal right" to any rate other than the filed rate. 359 U.S. at 469-470.[7]

Carnation v. *Pacific Westbound Conference, supra* is not a departure from the filed rate doctrine. The doctrine had no application there because it applies only if rates are both required to be filed with a regulatory agency *and* subject to pervasive regulation

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[7]The ICC described the holding in *T.I.M.E.* as follows:

> The Court held that the Motor Carrier Act itself does not give shippers a cause of action for recovery of allegedly unreasonable rates on past shipments, nor enable them to assert unreasonableness as a defense in carrier suits to recover applicable charges, and that any such common law right which may have existed did not survive the passage of the Motor Carrier Act. The same reasoning would apply to claims for reparation on past motor-carrier shipments by reason of alleged unjust discrimination or undue prejudice and preference. *Ford Motor Co.* v. *Standard Transportation Co., et al.,* 308 I.C.C. 304, 306 (1959).

by the agency.[8] As pointed out in the opinion below, (Pet. App. 28a-35a) at the time of *Carnation* the regulation of the rates of ocean carriers in foreign commerce was minimal. The FMC had no power to suspend rates, or to determine whether rates were unreasonably high or low, or to award reparations for unreasonable rates. Hence, under the regulatory scheme administered by the Federal Maritime Commission, the rates of ocean carriers did not establish the legal rights of shippers as against carriers "for all purposes", as do the rates of motor common carriers regulated by the ICC.

Moreover, the respondents in *Carnation* contended "that the Shipping Act, 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry." 383 U.S. 213, 216, and the Court granted certiorari "in order to determine whether the Shipping Act of 1916 . . . precludes the application of the antitrust laws to the shipping industry." 383 U.S. at 215. In contrast, respondents here make no such claim. Their contention is very narrow, namely that a shipper has no cause of action for damages based upon allegations that rates filed with the ICC would have been lower but for allegedly unlawful collective action. *Carnation* sheds no light on this issue and is

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[8]A violation by Entex, an exporter of natural gas, of the requirement that it file rate contracts and supplements thereto with FERC does not prevent unfiled supplemental rate contracts from taking effect because FERC has no regulatory authority over rates of exporters. *Compania De Gas Etc.* v. *Federal Energy Regulatory Commission,* 606 F.2d 1024 (D.C. Cir. 1979). The filed rate doctrine is inapplicable in such circumstances. *Compania De Gas Etc.* v. *Entex, Inc.,* 686 F.2d 322, 328, fn. 6 (5th Cir. 1982).

clearly not precedent overruling *Keogh* or supporting the proposition that it should be overruled.

II. Shippers Have Adequate Remedies Under the Interstate Commerce Act

The holdings in *Montana-Dakota* and *T.I.M.E.* left purchasers of gas in the one case and purchasers of motor common carriage in the other without any remedy whatever for the recovery of monies paid on the basis of unlawful rates because neither the Natural Gas Act nor the Motor Carrier Act made any provision for reparations. Purchasers of natural gas are still without any remedy. See *ARKLA, supra,* at page 578 ("[T]he Commission itself has no power to alter a rate retroactively" or to award reparations).

However, in 1965 the Congress amended then Section 204a of the Interstate Commerce Act to create a cause of action against motor carriers for the recovery of reparations. "For recovery of reparations, actions at law shall be begun against common carriers by motor vehicle . . . within two years from the time the cause of action accrues. . . . § 204a(2). The cause of action in respect of a shipment of property shall . . . be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after." § 204a(4). Reparations are defined as "damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in Section 216(e) of this Part, . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." § 204a(5).[9]

[9]Former Section 204a has been recodified and appears in present 49 U.S.C. § 11705(b)(3) and (c)(1). The recodified language is not a model of clarity, but it may not be construed as making any substantive change in the prior law. This prohibition requires examination of the prior language to determine the intent of Congress. *Trailer Marine Transport Corp.* v. *Federal Maritime Commission,* 602 F.2d 379, at 383, n. 18 (D.C. Cir. 1979).

Congress thereby gave the ICC limited authority over the past rates of motor common carriers, i.e., ancillary authority to determine lawfulness or unlawfulness in aid of the new jurisdiction given to the courts to entertain suits for reparations. As the ICC explained in *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation,* 335 I.C.C. 403 (1969), § 204a gave it no authority to entertain, formally or informally, shippers' claims for reparations, and that its *only* authority with respect to past rates was ancillary authority to determine, *after* a suit for reparations was brought, whether or not those rates were lawful under the substantive regulatory standards of the Interstate Commerce Act.

There was no remedy for the exaction of unreasonable rates by a motor carrier until the Congress created one in 1965. "It necessarily follows that [that remedy] provide[s] the sole and exclusive remedy for excessive charges." *Mohasco Industries, Inc.* v. *Acme Fast Freight, supra* at 1084. To the same effect is *U.S.* v. *Associated Transport,* 505 F.2d 366 (D.C. Cir. 1974).[10] As the court there said:

[10]In both *Mohasco* and *Associated Transport* shippers brought suit for restitution of monies paid to carriers on the basis of collectively made classifications that the ICC had permitted to take effect while under formal investigation and had subsequently ordered cancelled on the ground that NMFTA had not carried its burden of proof to show that they were just and reasonable. Both cases held that a suit for restitution would not lie.

> The frame and preamendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the past. By the 1965 amendment, Congress has relented somewhat, but only to the extent of admitting the current reparations procedure. (Footnote omitted) 505 F.2d at 369.

Concededly, the recovery of reparations requires findings by the ICC that the filed rates are unlawful under the regulatory standards of the Interstate Commerce Act. Therefore, petitioners could not prevail in a suit for reparations unless the ICC were to find that respondents' rates were above the zone of reasonableness. But this does not mean that shippers claiming that reasonable rates were established in violation of rate bureau agreements are without remedies.

First, the Commission has authority *sua sponte,* or upon complaint, to suspend for seven months pending investigation rates that appear to be unlawful, including rates alleged to have been established by unlawful collective action in violation of Section 14 of the Motor Carrier Act of 1980 or of the Commission's regulations thereunder or of rate bureau agreements. The Commission has not hesitated to exercise this authority, and to order the cancellation of rates it finds to have been unlawfully established.[11]

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[11]See ICC Case No. 71192, *Collective Ratemaking Procedures—Niagara Frontier Tariff Bureau, Inc.,* rates ordered cancelled, pending on judicial review in No. 84-1548 as *Niagara Frontier Tariff Bureau, Inc.* v. *U.S.* (USCA DC Cir.); I & S Docket No. M-30367, *Changes In Rates, Including Rates Based On Released Valuations, MAC,* rates ordered cancelled, affirmed on judicial review in No. 84-2195, *Middle Atlantic Conference* v. *U.S.* (USCA 4th Cir.) (not reported); I & S Docket No. M-30371, *Collectively Set Accessorial Rates and Charges On Household Goods, HGCB,* pending; I & S Docket No. M-30374, *Collectively Set Delivery Charges At Eastern Kentucky, C&SMFTA,* pending; I & S Docket No. M-30375, *International Commodity Rates and Terminal Charges, NFTB, October 1985,* pending; and I & S Docket No. M-30376, *Pickup and Delivery At Private Residences, C&SMFTA, October 1985,* pending.

Second, the Commission has established procedures under which it may, *sua sponte,* or will, upon complaint, enter into an investigation to determine whether filed and effective rates were collectively established in violation of Section 14 of the Motor Carrier Act of 1980, 49 U.S.C. § 10706(b), or the Commission's regulations thereunder or the terms of collective ratemaking agreements. In the event it finds a substantial violation it will order the cancellation of the rates retroactively. In *ATA* this Court held those procedures to be within the authority of the Commission to adopt. The Court described the remedy as follows:

> In effect, the Commission has informed all motor carriers submitting proposed tariff increases that the Commission will approve those increases subject to the condition that the carriers may be called upon to disgorge the increases if the Commission later discovers that the tariffs were submitted in substantial violation of a rate-bureau agreement. 81 L.Ed.2d at 292.

Recovery of the increases is by way of the recovery of overcharges measured by the difference between the unlawfully established rates and the prior rates.[12] As the Court said: "For a motor carrier, overcharge liability may be ruinous." 81 L.Ed.2d at 294. Hence, this remedy indeed gives the carriers strong incentives to abide the law and their collective ratemaking agreements.

The retroactive rejection remedy is superior to an antitrust damage remedy. Proof of antitrust damages would require proof that, but for the alleged conspiracy, lower hypothetical rates would have been filed with the ICC, and then referral to the ICC of the question whether the hypothetical rates would have been just, unreasonable and nondiscriminatory. Such a referral would present serious problems.

In the first place, as *Keogh* held, although the "powers conferred upon the [ICC] are broad, . . . by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been [unlawful] be submitted to the Commission." And *T.I.M.E.*, quoting *Montana-Dakota*, held there can be no referral of issues "which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide." 359 U.S. at 475. As we have seen, the only

[12]Former Section 204a(6) of the Interstate Commerce Act defines overcharges "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission." As recodified at 49 U.S.C. 11705(b) overcharges are defined as "amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title."

rate jurisdiction the ICC has respecting past rates is the ancillary jurisdiction to determine the lawfulness of *filed* rates after a suit for reparations has been brought. The Congress gave it no authority to determine whether *unfiled hypothetical* rates would have been lawful.

In the second place, determinations of the reasonableness of rates *vel non* must be made upon the consideration of numerous factors whose importance and relationships to each other are constantly changing. As this Court said in *Board of Trade* v. *United States*, 314 U.S. 534, 546 (1942): "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." Hence, determinations of reasonableness, if they are not to be largely speculative, must be made in the light of relatively contemporaneous conditions. This is evidenced by the fact that the Congress provided a statute of limitations of only two years for reparations. To ask the ICC to determine whether various hypothetical levels of rates that respondents might have established over a period of many years would have been reasonable would be to ask it to engage in pure speculation, Cf. *ARKLA*, in which both the majority and the dissent agreed that speculation by the Federal Energy Regulatory Commission in 1980 as to what rates would have been found reasonable in 1961, in which FERC declined to engage, would have been inappropriate.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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